PACK *et ux. v.* WHITAKER *et al.*

Sept. 9, 1909.

[65 S. E. 496.]

1. Equity (§ 148*)—Pleading—Multifariousness.—A bill by a purchaser of land, praying relief for a deficiency in acreage and a defect in title, was not multifarious, both demands arising out of the same contract and being so related that separate suits would be inconvenient and would not afford complete redress.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 341; Dec. Dig. § 148.*]

2. Injunction (§ 26*)—Subjects of Relief—Collection of Money—Price of Land—Defect in Title.—Equity has jurisdiction of a suit to enjoin the collection of part of the purchase price of land sold under general warranty deed for deficiency in acreage and defect in title.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 42; Dec. Dig. § 26.*]

3. Injunction (§ 197*)—Complete Relief—Retention of Jurisdiction.—Equity, having assumed jurisdiction of a suit to enjoin collection of the price of land for deficiency in acreage and defect in title, will retain it and do complete justice by compelling compensation for the deficiency and breach of warranty of title, and will not send plaintiff to a law court for such relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 417; Dec. Dig. § 197.*]

4. Deeds (§ 129*)—Construction—Estates Created—Life Estate.—A deed granted "unto the said W. P. and A. P., with general warranty, all that certain tract, * * * and it is further stipulated in this deed that the said W. P. shall have this land during their lifetime, and at their death it shall be the property of their children." Held, that there was no repugnancy between the granting and habendum clauses, and the wife's name was omitted from the latter clause by a mistake, so that the parties named took a life estate, with remainder to their children.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 360—365, 416-435; Dec. Dig. § 129.*]

5. Deeds (§ 93*)—Construction—Intention of Grantor.—The intention of the grantor should be taken in construing a deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 231, 232; Dec. Dig. § 93.*]

6. Deeds (§ 97*)—Construction—"Habendum."—The purpose of a "habendum" is to define the estate granted; and, if the whole instrument shows that it was intended by the habendum clause to restrict

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

or enlarge the estate conveyed by the granting clause, the habendum controls.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 270; Dec. Dig. § 97.*

For other definitions, see Words and Phrases, vol. 4, pp. 3199, 3200.]

7. Deeds (§ 113*)—Construction—Property Conveyed—Sale in Gross—"More or Less."—The description of land conveyed as containing so many acres, "more or less," constitutes a sale by the acre, unless it plainly appears from the whole deed that a sale in gross was intended.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 333; Dec. Dig. § 113.*

For other definitions, see Words and Phrases, vol. 5, pp. 4585-4595.]

Appeal from Circuit Court, Tazewell County.

Suit by L. B. Whitaker and others against William Pack and wife. From a decree for complainants, defendants appeal. Affirmed.

Chapman & Gillespie and *A. S. Higginbotham,* for appellants
Greever & Gillespie, for appellees.

WHITTLE, J. This is a suit in equity by the appellees to enjoin the appellants from collecting the last installment of purchase money of a tract of land situated in Tazewell county, Va., sold by them to the plaintiffs, and to recover of the defendants for a deficiency in quantity and for a defect in title of the land sold.

The bill alleges that both the contract of sale and conveyance were for 50 acres of land at $20 per acre, and that there was a deficiency in acreage and a defect in title to part of the land.

The defendants demurred to the bill, and answered, insisting that the sale was not by the acre, but in gross, and that their recorded title advised the plaintiffs that they only had a life estate in a portion of the land. Subsequently the defendants filed a cross-bill seeking rescission of the contract, to which bill the plaintiffs demurred.

The depositions of witnesses were taken with respect to the circumstances attending the execution of the contract of sale. At the hearing the court overruled the demurrer to the original bill, and denied the prayer of the cross-bill, and held that the sale was a sale by the acre, and not in gross, and, moreover, that the title of the defendants was in part defective, and, having ascertained by survey the shortage in the land to be 15.3 acres, proceeded to determine and establish the amounts which the plain-

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

tiffs were entitled to recover by reason of deficiency in quantity and defect of title, and referred the case to a commissioner for certain accounts. Thereupon Pack and wife obtained an appeal to this court.

The grounds of demurrer relied on are that the bill is multifarious, in that it sets out two distinct causes of action, namely, deficiency in acreage and defect in the title to the land; that an eviction is not alleged, and therefore suit cannot be maintained for defect of title, and, if it could be, that the remedy is not in equity, but at law, to recover damages for breach of warranty; that the plaintiffs have a complete and adequate remedy at law; and, lastly, that the bill incorrectly construes the deed to part of the land, limiting the estate of the defendants to a life estate, instead of a fee simple.

There is no merit in any of these grounds of demurrer. The bill, it is true, seeks redress for deficiency in land and defect of title; but both demands arose out of the same contract and are so correlated that separate suits would be inconvenient and would not afford complete redress. School Board *v.* Farish, 92 Va. 156, 23 S. E. 221; Johnson *v.* Black, 103 Va. 477, 49 S. E. 633, 68 L. R. A. 264, 106 Am. St. Rep. 890.

Nor can there be any question of the jurisdiction of equity in this class of cases. Our Reports are replete with illustrations of that doctrine; and, upon familiar principles, equity, having assumed jurisdiction for injunctive relief and to compel the vendors to make compensation for deficiency in quantity of the land, will retain it and do complete justice between the parties, and will not relegate the plaintiffs to a court of law to recover damages for breach of warranty of title.

In Koger *v.* Kane's Adm'r, 5 Leigh, 606, the principle is succinctly stated as follows: "Sale of Lands—Defect of Title—Injunction against Collection of Purchase Money. In Virginia, equity will enjoin the collection of the purchase money of land on the ground of defect of title, after vendee has taken possession under conveyance from vendor with general warranty, if the title is questioned by a suit either prosecuted or threatened, or if the purchaser can show clearly that the title is defective."

In Renick *v.* Renick, 5 W. Va. 285, it is said: "In the case of Clarke *v.* Hardgrove and others, 7 Grat. 399, which in its main facts is like the case under review, relief was granted the vendee by abating from the purchase money the relative value of the part of the lands purchased, for which the vendor had not title. The vendee, in that case, was in possession of land purchased, under a deed with covenants of general warranty, without other covenants, and alleged in his bill the defect in the title as to a part of the land, and that the vendor was 'probably in doubtful

circumstances.' The bill was dismissed by the circuit court on demurrer; but the Court of Appeals reversed the decree, and held that the vendee was entitled to relief (although there was no threatened or impending suit or eviction), and was not bound in such a case of clear defect of title to risk the hazard of his vendor's solvency." See, also, Ralston *v.* Miller, 3 Rand. 44, 15 Am. Dec. 704; Morgan *v.* Glendy, 92 Va. 89, 22 S. E. 854.

In Boschen *v.* Jurgens, 92 Va. 756, 24 S. E. 390, Keith, President, after citing a number of decisions by this court, observes. "These cases not only show that equity will take jurisdiction of this class of cases, upon the ground of mistake, but that every sale of real estate, where the quantity is referred to in the contract, and where the language of the contract does not plainly indicate that the sale was intended to be a sale in gross, must be presumed to be a sale while contracts of hazard are not invalid, courts of equity do not regard them with favor."

We do not think that the ground of demurrer which questions the correctness of the construction placed in the bill upon the deed from Fleman Pack to the defendants is well taken. The deed "grants unto the said William Pack and Angeline Pack, with general warranty, all that certain tract of land, * * * and it is further stipulated in this deed that the said William Pack shall have this land during their lifetime, and at their death it shall be the property of their children, to have and to hold."

The deed plainly shows that it was the purpose of the grantor to convey the land to William Pack and Angeline Pack for their lives, with remainder to their children; and, read as a whole, it is apparent that the name of Angeline Pack was inadvertently omitted from the latter clause. Unless the deed be so construed, the granting clause, so far as Angeline Pack is concerned, is meaningless. The two clauses, however, when read together, show that the omission of her name from the latter clause was the result of oversight. That clause was intended to read as follows: "It is further stipulated in this deed that the said William Pack and Angeline Pack shall have this land during their life." That was evidently the intention of the grantor, and the deed should be so interpreted. Harman *v.* Howe, 27 Grat. 676; Hutchings *v.* Commercial Bank, 91 Va. 68, 20 S. E. 950; Va. & Ky. Ry. Co. *v.* Heninger (decided at the present term) 65 S. E. 495.

There is no repugnancy between the granting and the habendum clauses, since the former does not in terms grant a fee-simple estate.

"The purpose of the habendum is to define the estate which the grantee is to take in the property conveyed, whether a fee, life estate, or other interest." Devlin on Deeds, § 213.

"If it appears from the whole instrument that it was intended by the habendum to restrict or enlarge the estate conveyed by the words of the grant, the habendum clause will prevail." Id. § 214.

In the answer the defendants concede that they only took a life estate in part of the land conveyed.

We are of opinion that the lower court rightly overruled the demurrer to the bill.

On the principal question, whether the sale was by the acre or in gross, there is great conflict in the oral testimony; but both the written contract of sale and the conveyance describe the land as containing "50 acres more or less," and such language constitutes a sale by the acre, unless it plainly appears that a sale in gross was intended.

In Triplett *v.* Allen, 26 Grat. 721, 21 Am. Rep. 320, it was held, where "the conveyance of the land, after giving the number of acres, adds the words 'more or less,' these words will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency, beyond what may be reasonably attributed to small errors from variation of instruments or otherwise, unless there be evidence to show that a contract of hazard was intended." In that case 10 acres in a tract of 166 acres was said not to be covered by the phrase "more or less."

In Epes *v.* Saunders, 109 Va. —, 63 S. E. 428, the leading decisions of this court on the subject are cited for the proposition that "where an agreement is entered into for the payment of a gross sum for a tract of land upon an estimate of a given number of acres, there is a presumption that the quantity influences the price to be paid, and that it is a sale by the acre, and not a sale in gross, unless the contract plainly indicates that it is a sale in gross; and this presumption can only be overcome by clear and cogent proof."

Upon the facts in the case, the circuit court could not have reached any other conclusion than that the sale was a sale by the acre, and not in gross; and, having determined that the plaintiffs were entitled to the relief prayed for, the prayer of the cross-bill for rescission was necessarily denied.

Upon the whole case, the decree under review is without error, and must be affirmed.

Affirmed.

Note.

Office of Habendum.—"The office of the habendum is to determine what estate or interest is granted by the deed, although it may be, and generally is, stated in the premises, in which case the habendum may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. In case of such

irreconcilable repugnancy, the premises generally prevail, for the habendum cannot divest an estate already vested by the premises." McDougal *v.* Musgrave, 46 W. Va. 509, 33 S. E. 282, citing 2 Bl. Comm. 298, 2 Min. Insts. 705.

Habendum Cannot Grant.—The office of the habendum is not to grant the estate, but only to limit its certainty: Co. Lit. 6a; Buckler's Case, 2 Co. 55; Earl of Shrewsbury's Case, 9 Co. Lit. b; Com. Dig., Fait, E, 9. But the habendum cannot enlarge the premises: Com. Dig., Fait, E, 10. Nothing can be limited in the habendum of a deed which has not been given in the premises, because the premises being that part of a deed in which the thing is granted, it follows that the habendum, which is only used for the purpose of limiting the certainty of the estate, cannot increase the gift, for in that case the grantee would in fact take a thing which was never given to him: 4 Cru. Dig. tit. 32, c. 20, § 73. Brown *v.* Manter (N. H.), 53 Am. Dec. 223, 224.

Habendum Not Essential.—The habendum, like any other part of the deed, may be examined in construing the instrument so as to effectuate the intention of the parties; yet it is not an absolutely essential part of the deed, and in modern conveyancing is being abandoned and quite generally becoming obsolete. If the grant or premises in the deed contain words of limitation, nothing remains for the habendum to accomplish, and it may be dispensed with. So unimportant is the habendum, that, if repugnant to the limitation appearing in the premises, it will be ineffectual to control the premises; and it may be rejected entirely when repugnant to or inconsistent with other clauses of the deed. Major *v.* Bukley, 51 Mo. 227; 3 Washb. Real Prop. 337. Hunter *v.* Patterson, 142 Mo. 310, 44 S. W. Rep. 250, 252.

Must Be Distinct from Premises.—"Chancellor Kent says that the habendum has degenerated into a mere useless form. 4 Kent Com. 468. Certainly with us it has practically fallen into disuse. In the case at bar the language relied on as an habendum cannot strictly be so considered. It is so connected with the premises that no judicial exposition severing the two clauses would be warranted. The latter clause beginning with the words 'the condition of this deed,' etc., etc., shows clearly that it was intended to explain and qualify the preceding grant and thus become a part of it, not repugnant thereto, but explanatory of the grant." Temple *v.* Wright, 94 Va. 338, 340, 26 S. E. 844.

Intention of Grantor Controls.—The technical common-law rule, that the habendum clause of a deed yields to the granting clause where there is a repugnance between the estate granted and that limited in the habendum, which is a consequence of the rule that deeds are construed most strongly against the grantor, is supported by abundant authority. It is, however, not to be invoked as a rule of construction except in those cases where the repugnance is such that the intention of the grantor cannot be determined with reasonable certainty from the whole instrument, for where that intention can be ascertained it is controlling if no legal obstacle lies in the way. Bassett *v.* Budlong, 77 Mich. 338; Fogarty *v.* Stack, 86 Tenn. 610; Bodine's Adm'r *v.* Arthur, 91 Ky. 53; 34 Amer. St. R., note p. 164; and note to Berridge *v.* Glassey, 56 Amer. R. 324; Temple *v.* Wright, 94 Va. 338, 340, 26 S. E. 844.

Premises and Habendum Reconcilable.—If, by fair construction, the habendum may be reconciled so that both may stand, effect will be given to both, and where the granting clause conveyed a fee estate by implication, but the habendum limited it to a life estate, with remainder over, the latter was held to control. Doren *v.* Gillum, 136 Ind. 134, 35 N. E. Rep. 1101, 1102.

The office of the habendum is to name the grantee, and to limit the certainty of the estate. If the premises in a deed are merely descriptive, and no particular estate be mentioned, except by implication, then the habendum becomes efficient to declare the intention. Berry *v.* Billings (Me.), 69 Am. Dec. 108.

Reconcilable under Statute.—Where the premises convey a fee simple to the grantee, no words of inheritance being necessary to convey a fee by statute, and the habendum vests a fee in the grantee by the operation of the rule in Shelley's Case, the two provisions are harmonious and the grantee takes a fee simple. Ratliffe *v.* Marrs, 87 Ky. 26.

Repugnant Habendum Void.—Where the purpose of the grant is clearly ascertained from the premises of the deed, and the premises contain proper words of limitation, and the habendum is repugnant to the grant, the habendum yields to the manifest intent and terms of the grant. Of so little importance is the habendum deemed, compared with the words of the grant, that if it is clearly repugnant to the grant it is treated as of no validity or effect: 2 Washburn on Real Property, 642; Shep. Touch. 75, 76. Flagg *v.* Eames (Vt.), 9 Am. Dec. 363, 368.

May Name Sole Grantee.—Where there is no grantee named in the granting part of a deed, the party named in the "habendum" may take. Where the grantor is named as grantee, it is a nullity; and the same rule applies as if no grantee were named in "the premises." Irwin *v.* Longworth, 20 Ohio 581.

If no name at all appears in the premises as the grantee, but such name first appears in the habendum, the courts effectuate the intention of the grantor by making the grantee named in the habendum the true grantee under the deed. 3 Washb. Real Prop. 319; Berry *v.* Billings, 44 Me. 416. McLeod *v.* Tarrant, 39 S. C. 271, 17 S. E. Rep. 773, 774.

A deed of conveyance of real estate is valid to pass the fee, even though in the granting part of the deed the grantor is also named as grantee, where the deed describes the grantor as the party "of the first part," and the grantee as the party of the second part, with an "habendum" clause to the party of the second part. In such case, the fee passes to the party who is "to have and to hold" the premises. Irwin *v.* Longworth, 20 Ohio 581.

May Name Co-Grantee.—Where the granting clause gave a life estate to a certain person, and the habendum gave a fee estate to the same person and another, the grantor clearly intending the latter estate, a divided court held that the habendum controlled, and gave a fee estate to each. McLeod *v.* Tarrant, 39 S. C. 271, 17 S. E. Rep. 773.

May Name Remainderman.—All the parts of a deed which precede the habendum, taken together, are called the premises; of which it is said, the office is rightly to name the grantor and grantee, and to comprehend the certainty of the thing granted. But though the grantee should first be named in the habendum, the grant to him will yet be good, provided there was not another grantee named in the premises: Co. Lit. 26, b, note; or if there were, provided the estate given by the habendum to the new grantee was not immediate, but by way of remainder. The habendum part of a deed was originally used to determine the interest granted, or to lessen, enlarge, explain, or qualify the premises. But it cannot perform the office of divesting an estate already vested by the deed; for it is void if it be repugnant to the estate granted in the premises: 2 Bl. Co. 298; Goodtitle *v.* Gibbs, 5 Barn. & Cress. 709; 4 Kent's Com. 468. Hafner *v.* Irwin (N. C.), 34 Am. Dec. 391.

May Declare Uses.—The habendum may provide to what use the grantee shall hold the estate, even where the statute of uses immediately converts it into a legal estate. Nightingale *v.* Hidden, 7 R. I. 115.

Never Enlarges Subject Matter.—And it was held in Manning *v.* Smith, 6 Conn. 289, that the habendum never extends the subject matter of the grant. There the premises granted land, and the habendum included the land and its appurtenances, which latter were held not to pass by the deed. Brown *v.* Manter (N. H.), 53 Am. Dec. 223, 224.

May Enlarge Estate by Clear Intent.—Where, in the habendum of the deed, the grantor uses words of inheritance, whereby the estate for life, set out in the premises, is enlarged to an estate in fee in the husband, this is allowed because the intention of the grantor is thus made clear to vest an estate in fee, rather than a life estate. Thus the cardinal principle governing the construction of deeds is made to appear, viz, that the intention of the grantor, if consistent with law, must govern. This principle is recognized and enforced by this court. Chancellor *v.* Windham, 1 Rich. Law, 161; McCown *v.* King, 23 S. C. 233, Mellichamp, 28 S. C. 120, 5 S. E. Rep. 333; Fuller *v.* Missroon, 35 S. C. 314, 14 S. E. Rep. 714; McLeod *v.* Tarrant, 39 S. C. 271, 17 S. E. Rep. 773.

In Hunter *v.* Patterson, 142 Mo. 310, 44 S. W. Rep. 250, 253, a fee tail granted in the premises is held not to be enlarged by a fee simple in the habendum, the court saying: "If the limitation in one part is to A. and his heirs generally and in the other part the estate is limited to A. and the heirs of his body, the two descriptions of the estate are not necessarily contradictory, and the specific limitation will prevail over the general limitation."

Habendum Cannot Divest Estate.—At the common law, the word "heirs" was necessary to create a fee simple in all feoffments and grants to natural persons, and conveyances to natural persons taking effect as transfers of the legal estates by the operation of the statute of uses. Littleton, § 1; Lom. Dig. 218, m; 4 Kent's Com. 5. And as deeds are to be taken most strongly against the grantor, when, by the premises, an estate is conveyed to one and his heirs, habendum to him for life, the habendum is repugnant and void, as it cannot perform the office of divesting an estate already vested by the premises. 2 Lom. Dig. 216; 4 Kent's Com. 468. Humphrey *v.* Foster, 13 Gratt. 653, 655.

May Limit Estate.—The premises do not always control the construction. Words importing a greater estate than one for life in the first taker may, by force of the context, be so limited as to give the first taker a life estate only with a remainder over: Reeder *v.* Spearman, 6 Rich. Ep. 89; Gillam *v.* Caldwell, 11 Rich. Eq. 73. The estate may be limited in the habendum, although not mentioned in the premises of a deed, and without the use of the word "remainder." Wager *v.* Wager, 1 Serg. & R. 374; Wommack *v.* Whitmore, 58 Mo. 448. Doren *v.* Gillum, 136 Ind. 134, 35 N. E. Rep. 1101, 1102.

May Explain Estate.—In Wager *v.* Wager, 1 S. & R. (Pa.) 374, the premises conveyed to A. and wife, "and to the children and heirs of" the wife, "and the heirs and assigns of such children;" habendum to A. and wife, and "to the children and heirs" of the wife, to the use of A. and wife during their joint lives and the life of the survivor, and after the death of the survivor to the use of the children and heirs of the wife; and it was held that the generality of the premises was explained by the habendum, and there was no contradiction.

Premises May Limit Estate.—If, indeed, he inartificial paper should be treated as containing the essential parts of a deed of conveyance

of a freehold estate of inheritance, without words which necessarily qualify the grant in fee, the limit in the habendum to an estate for years is void. But where the premises of a deed contain an express grant to a man and his heirs for a term of years, then the limitation for a term will qualify and lessen the grant in fee. Berridge *v.* Glassey, 112 Pa. St. 442, 3 Atl. Rep. 583, 584.

Intent Must Be Clear.—Where the granting clause of a deed gave the wife a fee simple, but the habendum gave her only an estate during widowhood, remainder to grantor's son, the whole instrument was looked to for grantor's intent, and the instrument held to pass only the latter estate. Whitby *v.* Duffy, 135 Pa. St. 620, 19 Atl. Rep. 1065.

Where the granting clause gives an estate to grantor's wife, and the habendum gives it "to her and her children by him begotten, forever," and the grantor clearly intended the habendum to qualify the estate granted in the premises, a life estate only vests in the wife, with remainder to the children. Bodine *v.* Arthur, 91 Ky. 53, 14 S. W. 904.

Under Virginia Statute.—But where the estate created by the premises is said to be a fee simple only under the Virginia statute dispensing with words of limitation, and the habendum clause expressly limits the estate to a life estate, only a life estate passes, since the statute also provides that the whole deed must be looked to in determining whether there is an express limitation. Humphreys *v.* Foster, 13 Gratt. 254.

In Partition Deed.—Where joint tenants have partitioned property by deed, and the premises apparently create estates by entireties in the husbands and their wives, but an habendum expressly limits the use and benefit of the property to the husbands, they amount to nothing more or less than a partition of the property. Keister *v.* Keister, 99 Va. 541, 544, 39 S. E. 164.